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"May I Offer You Something to Drink from the Beverage Cart": A Close Look at the Potential Liability for Airlines Serving Alcohol

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"MAY I OFFER YOU SOMETHING TO DRINK FROM THE BEVERAGE CART?": A CLOSE LOOK AT THE POTENTIAL LIABILITY FOR AIRLINES SERVING ALCOHOL

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AIRLINES INSTITUTED in-flight service of alcohol in the early fifties to promote an elegant means of air travel.[1] Since the fifties, however, alcohol sales have become a profit center for the airlines. This is evidenced by the fact that over-all liquor prices increased 45% since 1977 (related to inflation) while in-flight drink prices rose 100%.[2] Unfortunately for the airlines, several factors combine to make the service of in-flight alcohol a somewhat risky proposition. The airlines' financial incentive to continue alcohol service must be balanced with the promotion of passenger safety, as well as the potential for the imposition of server liability for the negligent acts of drunk passengers. This is especially true because of the potential for airline passengers to become inadvertently drunk. The consumption of two to three drinks at altitudes of approximately 10,000 to 12,000 feet has the

[1] Reukema, *Drinking and Flying: Why The Two Do Not Mix Well On U.S. Carriers*, 19 ANNALS OF AIR & SPACE L. 133 (1984). "Complimentary alcoholic beverages served in the first class cabin—even wine with meals in the economy class—were all part of the gracious relaxed image of air travel." *Id.*

[2] Flanagan, *Personal Affairs: High and Mighty,*. FORBES, Aug. 24, 1987, at 104; Reukema, *supra* note 1, at 133. "[W]e have duty-free alcohol allowances on international flights, free drinks in the first class section, free drinks on charter flights and, since the deregulation of the airlines in the United States . . . we have free drinks on any carrier trying to break into a new domestic market." *Id.* (footnote omitted).

physiological effect of four to five drinks.[3] In light of this fact, it is surprising that airlines have virtually escaped liability for injuries caused by intoxicated passengers. The airlines have little incentive to discontinue or limit alcohol service.[4] Because of the economic reward, and the remote possibility for imposition of server liability, airlines continue to serve virtually unlimited amounts of alcohol on domestic flights.

The lack of cases imposing vendor liability on airlines should not, however, be taken as an indication that the service of alcohol on planes creates a situation where there is less potential for alcohol related accidents and incidents. For example, one newspaper reported that an intoxicated passenger's behavior became so disruptive that the pilot made an unscheduled landing to remove the drunken passenger.[5] The danger to the safety of the flight and the other passengers by such an event is obvi-

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[3] R. MCFARLAND, HUMAN FACTORS IN AIR TRANSPORTATION, OCCUPATIONAL HEALTH AND SAFETY 298 (1953).

> [A]lcohol exercises its primary physiological action by depressing oxidation in the cells. This impairment is believed to occur not because alcohol interferes with the *transport* of oxygen to the tissues but because "the tissue cells are poisoned in such a manner that they cannot use the oxygen properly." . . . This interpretation explains (1) the striking effects of alcohol on the nervous system and (2) why alcohol and *oxygen want* produce more serious effects on the nervous tissue and consequently on behavior if both are experienced simultaneously.

Id.

[4] *See* Reukema, *supra* note 1, at 133.

> An inebriated passenger causes problems not only for himself when he feels ill, but also for his fellow travelers if he starts to make amorous advances or, more commonly, decides to act belligerently. In the latter case, the drunken passenger has transformed himself into a safety hazard. The blame, however, for this metamorphosis should perhaps be laid at the airlines' door.

Id.

[5] *Id.* at 137-38.

> In January 1981, [a passenger] . . . was aboard Laker Airways' flight from London to Los Angeles en route to starting a job in Califor[n]ia. He had been drinking heavily and when he was refused any further alcoholic refreshment he became violent, screaming at and kicking both the passengers and the pilot. His conduct was such that not only was he tied to his seat by some of the other passengers, but the pilot was also forced to make an unscheduled landing at

ous. It seems, however, that recognition and awareness by the public of such incidents is limited. In sharp contrast, the recent national concern over drunk driving has given momentum to the increased imposition of server liability on more traditional alcoholic beverage servers.[6] Litigation over server liability escalated an estimated three hundred percent over the past two years.[7] This trend represents a change from the traditional common law theory that a commercial vendor is not responsible for the negligent acts of intoxicated patrons.

This comment focuses on the potential for imposing vendor liability on airlines as a result of in-flight alcohol service. An intoxicated passenger potentially endangers the safety of other passengers, as well as innocent third parties on the ground. The nature of the airline industry presents some interesting and difficult legal questions concerning liability for alcohol sales. For domestic flights, a court must determine whether federal law, under the Federal Aviation Act and FAA regulations, pre-empts state dram shop law.[8] If federal law pre-empts state law, a court must decide if the injured plaintiff has a private right of action based on FAA regulations.[9] If federal law does not pre-empt state law, there is the question of which state law applies. Because planes often depart from one state, fly across several states, and land in yet another state, it is difficult to determine what law applies. This comment analyzes these issues by looking at the potential

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> Winnepeg Airport in order that [the passenger] could be removed from the aircraft.

Id. at 137 (citing the Montreal Gazette, January 6, 1981, at 8).

[6] Goldberg, *One For The Road: Liquor Liability Broadens*, A.B.A. J., June 1, 1987, at 84. "Groups like SADD and MADD have given momentum to the trend by increasing public awareness of the consequences of drunk driving." *Id.*; *see also* Comment, *Liability of Commercial Vendors, Employers, and Social Hosts For Torts Of The Intoxicated*, 19 WAKE FOREST L. REV. 1013 (1983).

[7] Goldberg, *supra* note 6 , at 84. "In the last twenty months alone, appellate level courts in nearly a dozen states have considered cases involving liquor liability. Liability generally is based on serving alcohol to someone who is obviously intoxicated or under the legal drinking age." *Id.*

[8] *See infra* notes 13-86 and accompanying text.

[9] *See infra* notes 32-50 and accompanying text.

for airline liability based on the sale of alcohol to passengers under the theories of: (1) a violation of the FAA regulations;[10] (2) common law negligence;[11] and (3) a violation of state dram shop legislation.[12]

I. THE THRESHOLD ISSUE: DOES THE FAA REGULATORY SCHEME PRE-EMPT STATE DRAM SHOP REGULATION

The federal government regulates flights within the boundaries of the United States under the statutory scheme of the Federal Aviation Act. The Act authorizes the Administrator of the Federal Aviation Administration (FAA) to prescribe air traffic rules and regulations governing aircraft in order to promote safe air travel.[13] These FAA regulations govern rates, routes, and services of domestic airlines with interstate routes to the exclusion of state regulation.[14] Before imposing vendor liability on an airline, a court must determine whether the Federal Aviation Act, through the FAA regulations, pre-empts state dram shop laws as an impermissible regulation of services of domestic airlines with interstate routes.[15]

In deciding whether FAA regulations pre-empt state law, one central question is whether Congress intended, within the existing statutory framework, to regulate the

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[10] *See infra* notes 32-50 and accompanying text.

[11] *See infra* notes 93-131 and accompanying text.

[12] *See infra* notes 132-144 and accompanying text.

[13] 49 U.S.C. app. § § 1348(a), 1421 (1982).

[14] 49 U.S.C. app. § 1305(a)(1) (1982). "[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide interstate air transportation." *Id.*

[15] Manfredonia v. American Airlines, Inc., 68 A.D.2d 131, 416 N.Y.S.2d 286 (App. Div. 1979).

> "It is well established that within Constitutional limits Congress may preempt state authority by so stating in express terms. . . . Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law.

Pacific Gas & Elec. v. State Energy Resources, 461 U.S. 190, 203-04 (1983) (citations omitted).

service and sale of alcohol on airlines to the exclusion of the states. Congress can pre-empt state regulation in express terms, or through a pervasive regulatory scheme which leaves nothing for the states to regulate.[16] The Act, through the FAA regulations, expressly pre-empts state law governing the rates, routes, and services of domestic airlines. It is debateable, however, whether Congress intended to pre-empt state regulation concerning all aspects of air travel. The FAA regulation which could arguably pre-empt the imposition of state dramshop laws provides: "No person may drink any alcoholic beverage aboard an aircraft unless the certificate holder operating the aircraft has served that beverage to him. . . . No certificate holder may serve any alcoholic beverage to any person aboard any of its aircraft who . . . appears to be intoxicated."[17]

The outcome of the pre-emption question has a significant impact on the plaintiff's potential recovery for injuries caused by an intoxicated passenger. If the FAA regulations do not pre-empt state law, a person seeking recovery for injuries could base their claim on either state common law or state dram shop legislation. The result of a determination that federal law pre-empts state law, however, is that any potential recovery based on vendor liability must arise from an implied private right of action under the FAA regulations. This entails a judicial determination that the plaintiff has standing under the federal legislation. Of the few cases which discuss the potential liability for service of alcohol on airlines, only one case discusses the issue of federal pre-emption.

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[16] Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 236 (1946) (United States Warehouse Act held to pre-empt state regulation of warehouses licensed under the Act although this was a field traditionally regulated by the states).

[17] 14 C.F.R. § 121.575 (a)-(b)(1) (1988).

A. *Federal Pre-emption in* Manfredonia v. American Airlines, Inc.[18]

In *Manfredonia*, a passenger brought suit against the airline for injuries caused by an intoxicated passenger during a flight from New York to Los Angeles.[19] The plaintiff testified that the intoxicated passenger, who was served several drinks by the airline attendants,[20] made sexual advances toward her and struck her in the eye when she did not respond.[21] The plaintiff based her claim on two theories: (1) that the airline breached a common law duty of care to protect her from the violence of an intoxicated passenger, and (2) that the airline violated the "applicable" laws which prohibit the sale of alcohol to an already intoxicated person.[22]

In a requested bill of particulars, the plaintiff identified the source of her second cause of action as the airline's violation of FAA regulations.[23] At trial, however, the judge allowed the plaintiff to switch the source of her second claim to a violation of the New York dram shop act.[24] The jury returned a verdict in favor of the defendant on the charge of common law negligence in failing to exercise proper care toward the plaintiff,[25] and in favor of the plaintiff on the claim that the defendant breached the New York dram shop laws.[26]

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[18] 68 A.D.2d 131, 416 N.Y.S.2d 286 (App. Div. 1979).

[19] *Id.* at 131, 416 N.Y.S.2d at 287.

[20] *Id.* at 131, 416 N.Y.S.2d at 287.

[21] *Id.* at 131, 416 N.Y.S.2d at 287. One of the plaintiff's witnesses testified that the plaintiff complained to the attendants about the man's conduct. The witness further testified, however, that the drunk passenger hit the plaintiff after she uttered a racial slur. *Id.* at 131, 416 N.Y.S.2d at 287 n.1.

[22] *Id.* at 131, 416 N.Y.S.2d at 287.

[23] *Id.*; *see supra* note 16 and accompanying text.

[24] *Manfiedonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 287. Overruling the defendant's objections, the trial judge submitted the case to the jury based on a theory of violation of the New York dram shop laws. *Id.* at 131, 416 N.Y.S.2d at 287-88.

[25] *Id.* at 131, 416 N.Y.S.2d at 287-88. The plaintiff did not appeal this finding.

[26] *Id.* at 131, 416 N.Y.S.2d at 287.

> The jury's verdict in favor of the plaintiffs ensued after a charge by the Trial Judge that a breach by defendant of the provisions of section 11-101 of the General Obligations Law would render the defendant liable for the damages caused by the assault on Linda, if the

The defendant appealed the trial court's finding of a breach of the state dram shop law by arguing that New York law could not be given extraterritorial effect.[27] In other words, the airline argued that New York could not apply its dram shop statute to a situation where the consumption of the alcohol and the injury occurred outside the state boundaries of New York.[28] The court rephrased the issue on appeal and inquired whether the dram shop act applies to an airline in interstate flight either based on extraterritorial jurisdiction or "in the face of Federal preemption."[29] The court agreed with the defendant that the New York statute could not be given extraterritorial effect over service of alcohol on airplanes because federal law, through the Federal Aviation Act, pre-empts state dram shop law.[30] The appellate court in *Manfredonia* did not, however, leave the plaintiff without a remedy. The court remanded the case and granted a new trial based on its determination that the FAA regulations create a private right of action against the airline from which the plaintiff might be able to recover.[31]

> jury found that the defendant had sold intoxicating beverages to the offending passenger when the passenger was intoxicated and that his intoxication had contributed to Linda's injury.

Id. at 131, 416 N.Y.S.2d at 287.

[27] *Id.* at 131, 416 N.Y.S.2d at 287. "The true inquiries must be whether New York intended that its statute should operate beyond its limits, and then, whether as a matter of Federal control, the statute can operate beyond the New York boundaries, even assuming that the statute may have been intended to have that effect." *Id.* at 131, 416 N.Y.S.2d at 289. The defendant also argued that "the plaintiffs only interjected the statute as a ground for liability at the time the case was about to go to the jury and therefore waived the provisions of the statute." *Id.* at 131, 416 N.Y.S.2d at 287.

[28] The extraterritorial application of state dram shop laws is beyond the scope of this comment. For a discussion of this issue, see Annotation, *Choice of Law-Liability of Liquor Seller*, 2 A.L.R. 4th 952 (1980).

[29] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 288.

[30] *Id.* at 131, 416 N.Y.S.2d at 288. The court determined that the New York statute did not have extraterritorial effect and that federal law pre-empts state law on this issue.

[31] *Id.* at 131, 416 N.Y.S.2d at 287, 292.

B. *Private Right of Action Based on FAA Regulations*

The court in *Manfredonia* indicates that the FAA regulations may create a private right of action for a passenger injured in flight as a result of the airline's service of alcohol to another passenger. The Federal Aviation Act provides that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies."[32] In order to create a remedy for the plaintiff in *Manfredonia*, the court interpreted this "savings clause" as preserving the state remedy provided by New York's dram shop legislation through an implied federal right of action based on FAA regulations.[33]

Under the established test in *Cort v. Ash*,[34] an implied right of action arises when: (1) the regulation is intended to protect a particular class of persons; (2) there is an intention to create or deny a private right; (3) the right would be consistent with the goal of the statute; and (4) the cause of action is one traditionally left to state law.[35] Applying this test, the *Manfredonia* court determined that the FAA regulation creates such an implied right of action because: (1) the plaintiff, as a passenger, is a member of the class protected under the regulation;[36] (2) the statute does not explicitly deny a private right of action; (3) a private right of action furthers the goal of protecting the safety of passengers by encouraging compliance with the regulations; and (4) the "public policy of New York, exemplified in the dram shop act, is entirely in accord with

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[32] 49 U.S.C. app. § 1506 (1982).

[33] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 290-91. *But see* Diefenthal v. Civil Aviation Board, 681 F.2d 1039 (5th Cir. 1982) (no implied right of action for injunctive relief under the structure of the federal aviation regulations to require an air carrier to comply with its own rules on smoking).

[34] 422 U.S. 66 (1975).

[35] *Id.* at 78.

[36] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 291. "The statute, it is clear, is instinct with a pervasive interest in safety of the passengers . . . . An intoxicated passenger may pose a serious threat to the safety of all on the aircraft." *Id.* at 131, 416 N.Y.S.2d at 291.

the objectives of the Federal statute . . . ."[37] Interestingly, the court seemingly glosses over the fourth factor in *Cort v. Ash* which inquires whether "the cause of action [is] one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law."[38] The regulation of the sale of alcohol is certainly an issue traditionally relegated to the states. Arguably, it is inappropriate to imply a right of action under Federal law based on state dram shop theories.[39]

C. *Effect of the Holding in Manfredonia*

The court's determination in *Manfredonia* that an injured passenger has a private right of action under the FAA regulations for injuries sustained from an intoxicated passenger creates policy problems. For example, at least two other foreseeable victims do not benefit from such a private right of action because they are not members of the class benefitted by the regulation. The creation of a private right of action, along with the court's finding of pre emption of state dram shop laws, remove the possibility of recovery for: (1) the intoxicated passenger for injury due to his own intoxication, and (2) a third-party injured on the ground by an intoxicated passenger. The presence of these inconsistent remedies undercuts the goal of federal pre-emption to provide uniformity of remedies.[40]

In fact, five years after the decision in *Manfredonia* the same court held in *O'Leary v. American Airlines*[41] that a violation of the FAA regulation prohibiting the sale of alcohol to an intoxicated passenger did not create an implied private right of action on behalf of the *passenger* for his own injuries.[42] The court determined that the purpose of

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[37] *Id.* at 131, 416 N.Y.S.2d at 292.

[38] *Cort*, 422 U.S. at 78 (1975).

[39] *See infra* notes 58-86 and accompanying text.

[40] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 290 (citing Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)).

[41] 100 A.D.2d 959, 475 N.Y.S.2d 285 (App. Div. 1984).

[42] *Id.* at 959, 475 N.Y.S.2d at 287.

the FAA regulation is to ensure the safety of the flight and the protection of passengers who might be injured by the intoxicated passenger.[43] The court reasoned that a passenger injured by his own intoxication is not one of the intended beneficiaries of the statutory private right of action. If the passenger's conduct does not impose risk to the safety of the flight or to other passengers, the court held that the regulation does not protect a passenger from his own conduct.[44] The court's dermination that the regulation benefits one passenger's injuries over another draws a seemingly fine distinction concerning the purpose of regulation. If the underlying purpose of the regulation is "to ensure the safe operation of the aircraft by minimizing the disorderliness caused by an intoxicated passenger",[45] it is equally plausible that the definition of "disorderliness" includes a passenger's injury or death due to his own intoxication.

The decisions in *Manfredonia* and *O'Leary* create a potentially inconsistent framework for airline vendor liability. First, it is debateable under the *Cort v. Ash* analysis whether the FAA regulation prohibiting the sale of alcohol to an intoxicated passenger affords only some passengers a private right of action against the airline. The lack of a remedy for certain foreseeable victims is one of the strongest reasons for finding that the FAA regulations do not pre-empt state vendor liability laws. If the intent of the regulation is to ensure the safe operation of the aircraft, perhaps it was never a contemplated purpose of the regulation to compensate *any* passenger for injuries resulting from another passenger's intoxication. It is equally as plausible that all passengers are the beneficiaries of the regulation which ensures that pilots are not

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[43] *Id.* at 959, 475 N.Y.S.2d at 287. The court stated that "recognition of a private right of action on behalf of the decedent for breach of the regulation is not consistent with the statutory purpose." *Id.* at 959, 475 N.Y.S. at 288. (citation omitted).

[44] *Id.* at 959, 475 N.Y.S.2d at 287-88.

[45] *Id.* at 959, 475 N.Y.S.2d at 289 (dissenting opinion) (citing F.R. Doc. No. 59-5580, filed July 2, 1959).

distracted from their duties of safely flying the aircraft by drunk passengers. Second, if the airline has a recognized duty to exercise care to keep its passengers safe from known risks or dangers,[46] a passenger injured by an intoxicated passenger does not need a judicially created private right of action under an FAA regulation in order to recover. The basis for the plaintiff's recovery, therefore, would be a breach of the common law duty of a common carrier to ensure the safety of its passengers.[47] Third, another problem with creating an implied right of action under the Federal Aviation Act and related regulations is that federal courts rarely find implied causes of action.[48] Recent cases lead to the conclusion that if Congress does not expressly create a right of action, then Congress probably does not recognize such a right of recovery.[49] Last, it is unclear whether it is advisable to create federal common law that displaces state law. Answering this question requires a balancing of federal and state interests. The regulation of liability for negligent service of alcohol is primarily a state interest. The creation of federal common law by implying a private right of action under the FAA regulations does not follow the recent trend in federal cases.[50]

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[46] *See id.* at 959, 475 N.Y.S.2d at 288.

[47] *See supra* note 25 and accompanying text.

[48] *See* California v. Sierra Club, 451 U.S. 287 (1981) (statute did not create a federal private right of action in a special class of beneficiaries but rather benefitted the public as a whole); TransAmerica Mortgage Advisors Inc. v. Lewis, 444 U.S. 11 (1979) (Investment Advisors Act of 1949 is designed to protect investment advisors' clients but does not require the implication of a private cause of action for damages). *But see* Merrill Lynch, Pierce, Fenner & Smith v. Curran, 456 U.S. 353, 374-93 (1981) (a private party may maintain an action for damages under the Commodity Exchange Act where Congress amended the Act and left intact provisions under which prior courts implied a private cause of action).

[49] *See Sierra Club*, 451 U.S. at 297. "The federal judiciary will not engraft a remedy on a statute, no matter how salutary, that Congress did not intend to provide." *Id.*

[50] *See* Miree v. DeKalb County, 433 U.S. 25 (1977) (when no rights or duties of the United States are effected by the outcome of litigation between private parties, the rule that federal common law governs in diversity cases where a uniform national rule is necessary to further the government's objectives is inapplicable).

D. *Pre-emption and the Twenty-First Amendment*

In determining that federal aviation law pre-empts state dram shop laws, the court's starting point in *Manfredonia* was an analysis of a state's power to regulate the sale of alcohol.[51] Under the twenty-first amendment, states have absolute power to regulate the "times, places, and circumstances under which liquor may be sold" within state borders.[52] The court in *Manfredonia* noted, however, that the twenty-first amendment does not empower the state to regulate alcohol sales outside of the state, or in an area under exclusive Federal control.[53]

In order to define the scope of a state's regulatory power under the twenty-first amendment, courts must determine what areas constitute areas under exclusive federal control. In *United States v. State Tax Commission*, the Supreme Court held that a states' regulatory power under the twenty-first amendment did not include regulation over importation of liquor onto a military base within the state.[54] The court reasoned that a military base is an area over which the United States has exclusive jurisdiction.[55]

The court in *Manfredonia* equated the United State's sovereign jurisdiction over military bases with exclusive federal jurisdiction over the operations of interstate trans-

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[51] *Manfredonia*, 68 A.D.2d at , 416 N.Y.S.2d at 290; *see* U.S. CONST. amend. XXI, § 2. "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." *Id.*

[52] New York State Liquor Authority v. Bellanca, 452 U.S. 714, 715 (1981); *see also* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 475-78 (2d ed. 1988). "The amendment sanctions state action which taxes, regulates, or completely bars the importation of liquor for actual use within the state itself, even where such action would be forbidden as to any other commodity." *Id.* at 476-77 (citation omitted).

[53] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 290 (citing United States v. State Tax Comm'n 412 U.S. 363, 375 (1973)); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324, 329-34 (1964).

[54] United States v. State Tax Comm'n, 412 U.S. 363 (1973) (the state's legitimate powers under the twenty-first amendment did not extend to permit the state to tax and regulate wholesale liquor transactions between the United States, represented by the military base, and the out-of-state distillers).

[55] *Id.* at 369-73.

portation.[56] Under this analysis, the federal airways are under the exclusive control of the federal government. No state, therefore, could regulate the sale of alcohol on board an aircraft traveling interstate. Based on this premise, the court concluded that federal law pre-empts state dram shop law.[57] There is a plausible argument, however, that the particular FAA regulation prohibiting the sale of alcohol to an intoxicated passenger does not pre-empt state dramshop laws. Under this view, the twenty-first amendment allows a court to find an airline liable for injuries related to in-flight alcohol service based on state law.

1. *Re-examination of the Limitation on State Regulation Under the Twenty-First Amendment*

In repealing the eighteenth amendment, the twenty-first amendment changed the allocation of power over the regulation of the sale of alcohol.[58] The result was a presumption in favor of the authority of the states, not Congress, to regulate liquor traffic as a matter of constitutional law.[59] As noted in *Manfredonia*,[60] there are limitations on this regulatory power.[61] In particular, the twenty-first amendment does not allow a state to regulate the transportation of liquor into areas under the exclusive

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[56] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 290 (citing 49 U.S.C. app. subch. VI (1982)).

[57] *Id.* at 131, 416 N.Y.S.2d at 290. "Preemption [sic] by Congress of a field of regulation implies an inherent need for nationwide uniformity and Federal primacy . . . [v]arying State dram shop acts would perforce disturb the uniformity of Federal regulations." *Id.* (citations omitted).

[58] L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 6-24, at 475 (2d ed. 1988).

[59] New York State Liquor Auth. v. Bellanca, 452 U.S. 714 (1981) (a state's broad power under the twenty-first amendment includes the constitutional right to prohibit nude dancing in establishments licensed to sell liquor in deference to any artistic or communicative rights under the first amendment); Hostetter v. Idlewild Bon Voyage Liquor Corp., 377 U.S. 324 (1964); Ziffrin Inc. v. Reeves, 308 U.S. 132 (1939) (regulation by a state may impose some burden on interstate commerce when such power is left to the states by the Constitution).

[60] *See supra* notes 53 - 59 and accompanying text.

[61] L. TRIBE, *supra* note 52, at 476. "For example, state power over alcoholic beverages in transit through the regulating state is quite limited, since the twenty-first amendment is limited by its very terms to importation of liquor into a state for delivery and use therein." *Id.*

jurisdiction of the federal government.[62]

The Supreme Court in *United States v. State Tax Commission*[63] and *Collins v. Yosemite Park & Curry Co.*[64] held that because national parks and military bases are places under the exclusive sovereignty of the federal government, the states cannot regulate the transportation of liquor into parks and bases. The underlying rationale is that the twenty-first amendment allows the states to regulate the importation and transportation of alcohol for delivery and use only within the borders of each state. If alcohol is delivered to an area under the exclusive sovereignty of the United States, the twenty-first amendment does not apply because there is no delivery or use within the borders of a state.

Under the Federal Aviation Act, the term "federal airway" refers to that part of the navigable airspace as designated by the Secretary of Transportation.[65] The Secretary of Transportation is authorized to institute regulations which are necessary to insure the safety of aircraft and the efficient use of airspace.[66] An airway has been defined as a free highway in the sky.[67] There exists on behalf of all citizens of the United States a public right of transit

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[62] *State Tax Comm'n*, 412 U.S. at 375 (local state authorities could not under the authority of the twenty-first amendment prevent military bases located in the state from buying cheaper out-of-state liquor); Collins v. Yosemite Park & Curry Co., 304 U.S. 518 (1938) (California could not require concessionaires within Yosemite National Park to apply for permits for the importation and sale of liquor because the National Park was a territory over which the state ceded exclusive jurisdiction to the United States).

[63] 412 U.S. at 363.

[64] 304 U.S. at 518.

[65] 49 U.S.C. app. § 1301(21) (1982).

[66] 49 U.S.C. app. § 1348(a) (1982).

[67] *See* Wichita v. Clapp, 125 Kan. 100, 263 P. 12, 15 (1928).

> The term "airway" applies to air routes for either airplanes or seaplanes. An airway is far more than a mere air line. It is a material and permanent way through the air, laid out with the precision and care that an engineer adopts in choosing the course of and laying down of a railway. . . . The term airway is essentially a free highway. As such, it is open to all qualified aircraft. It is rightly, therefore, a federal undertaking to lay out and equip airways.

125 Kan. at 100, 263 P. at 14-15.

through this navigable airspace.[68] In contrast, a private citizen does not have such rights of transit into other areas under the exclusive sovereignty of the United States, such as a military base.

Arguably the federal airways are under the exclusive jurisdiction of the federal government based on federal regulation of the airways. There are distinct differences, however, between the federal airways and federal land such as national parks and military bases. The most dramatic difference is that federal jurisdiction of parks and military bases follows from direct ownership of such property by the United States government. The United States does not own the airlines that use the federal airways, but merely regulates the industry as a whole to promote safe air travel.

If airlines could be held liable under state law for injuries sustained as a result of negligent sale of liquor based on state dram shop laws, the state would not be attempting to regulate the use of alcohol outside of the power granted under the twenty-first amendment. This conclusion is reinforced by the fact that a state has the power to impose liability on those who cause torts within its borders.[69] Under this analysis, the states' power to impose dram shop liability on commercial airlines is based on general state power to grant remedies for torts occurring within its borders, and not upon the states power to control alcohol sale under the twenty-first amendment.[70]

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[68] 49 U.S.C. app. § 1304 (1982).

[69] *See* Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408 (1984) (numerous and substantial contacts constitute "doing business" in a state and are sufficient minimum contacts to find personal jurisdiction); Keeton v. Hustler Magazine, Inc., 465 U.S. 770 (1984) (circulation of a magazine in the forum state creates sufficient minimum contacts to support jurisdiction in a libel suit based on the contents of the magazine).

[70] This scenario specifically refers to a fact situation where a third-party on the ground is injured by an intoxicated passenger. For example, an intoxicated passenger picks his car up at the airport and causes an accident on the drive home. Ironically a state can avoid the "federal jurisdiction" limitation on the twenty-first amendment with this argument. However, a passenger injured in-flight would have to resort to the argument used in *Manfredonia* because the tortious conduct occurred beyond the boundaries of any state.

2. *Re-examination of Pre-emption*

In determining whether a federal law pre-empts state law, the first inquiry is whether Congress occupies the field to the exclusion of state action.[71] If Congress does not occupy a field to the exclusion of the states, the next question is whether there is an irreconcilable conflict between the state and federal law, or whether state law frustrates the objectives of the federal law.[72] Pre-emption occurs to the extent that the state law actually conflicts with federal law.[73] If the field is traditionally one which is within the domain of the states, there is an assumption that the federal regulatory scheme does not pre-empt the state law unless Congress clearly manifests such an intent.[74]

There are many cases that consider whether the Federal Aviation Act, through the FAA regulations, pre-empts various types of state law. The determination of pre-emption is based on the subject matter sought to be regulated by the states. One area clearly pre-empted by federal regulation is state and local control over aircraft noise.[75] The Supreme Court has determined that based on the pervasive federal scheme regulating aircraft noise, Congress intended to occupy this field to the exclusion of state and local regulation.[76] Included in the pervasive regulatory scheme of noise control are the Noise Control Act of 1972, FAA regulations and regulations of the Environmental Protection Agency.[77]

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[71] Pacific Gas & Elec. v. State Energy Resources, 461 U.S. 190 (1983) (although the Atomic Energy Act of 1954 pre-empts the state regulation of the safety aspects of a nuclear plant, a California statute prescribing adequate storage facilities for nuclear waste is within traditional state responsibility of economic uses of energy and is therefore outside the occupied field of federal law).

[72] *Id.* at 204.

[73] *Id.*

[74] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977) (federal laws regulating net-weight labeling pre-empt state statutes regarding such labeling); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (United States Warehouse Act pre-empts state law in all aspects).

[75] City of Burbank v. Lockheed, 411 U.S. 624 (1972).

[76] *Id.* at 633.

[77] *Id.*

Other areas of state regulation are not, however, considered pre-empted by the federal scheme of aviation regulation. For example, state laws governing reckless operation of an aircraft are not pre-empted by the FAA regulations.[78] The manner in which an airline advertises its rates and routes is governed by state law and is not pre-empted by the Federal Aviation Act.[79] In addition, federal legislation does not pre-empt state and local jurisdiction concerning the placement of private helistops.[80] From these cases, it is apparent that federal law pre-empts state and local regulation of the operation and navigation of aircraft but does not disturb significant local power over ground operations.[81]

One confusing provison of the Federal Aviation Act expressly declares that the provisions of the Act will not abridge remedies available under state law.[82] The Supreme Court has held that a "common-law right, even

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[78] *See* People v. Valenti, 153 Cal. App. 3d Supp. 35, 200 Cal. Rptr. 862 (1984) (California statute which provides punishment for flying an aircraft below prescribed federal levels was not unconstitutional based on the Supremacy Clause); Ward v. Maryland, 374 A.2d 1118 (Md. 1977) (state statute making it a crime to recklessly operate an aircraft is not pre-empted by federal law which imposes civil rather than criminal penalties for the same conduct).

[79] People v. Western Airlines, Inc., 155 Cal. App. 3d 597, 202 Cal. Rptr. 237 (1984) (Congress granted the Board the right to regulate unfair competition and deceptive trade practices but this did not mean that Congress intended to prevent states from also regulating deceptive advertising practices).

[80] Garden State Farms, Inc. v. State of New Jersey, 77 N.J. 439, 390 A.2d 1177 (1978) (company seeking to maintain a helistop brought an action to invalidate a statute prohibiting such use).

[81] *Id.* at 439, 390 A.2d at 1181. *But see* O'Carroll v. American Airlines, 863 F.2d 11 (5th Cir. 1989)(Federal Aviation Act pre-empts a state law claim based on wrongful exclusion from a flight). The court held that the common law claim of unlawful exclusion was pre-empted by 49 U.S.C. app. § 1305(a)(1), which states: "[N]o State . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes or services of any air carrier. . . ." *O'Carroll*, 863 F.2d at 13. The court, however, does not distinguish the common law claim of unlawful exclusion from cases which have held that state claims are not pre-empted by the Federal Aviation Act. *See supra* notes 75-80 and accompanying text.

[82] 49 U.S.C. app. § 1506 (1982). The statute provides in pertinent part that "[n]othing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies." *Id.*

absent a saving clause, is not to be abrogated 'unless it [is] found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy . . . .' "[83] States enact dram shop acts pursuant to their authority to regulate the sale of alcohol within their borders under the twenty-first amendment.[84] Dram shop acts provide remedies for the negligent sale of alcohol. By its terms, the Federal Aviation Act prohibits the pre-emption of state dram shop laws because pre-empting state dram shop laws would abridge remedies available under state law.

State dram shop laws neither conflict with nor frustrate the FAA objectives of the regulation prohibiting the sale of alcohol to an intoxicated passenger.[85] State dram shop statutes are intended to protect members of the community from preventable harm. The purpose of the FAA regulation controlling alcohol service is to protect the safety of flights from intoxicated passengers.[86] The federal policies are enhanced, not frustrated, by the application of state dram shop laws.

II. AIRLINE VENDOR LIABILITY BASED ON STATE LAW

If the scheme of federal aviation law does not pre-empt state actions for vendor liability and there are no remedies available under the FAA regulations, in order to recover against an airline a plaintiff must prove negligence based on either a common law or statutory cause of action. During the post-Civil War period, state legislatures adopted "dram shop" statutes.[87] By the 1870's, at least eleven

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[83] Nader v. Allegheny Airlines, 426 U.S 290, 298 (1976) (quoting in part Texas & Pac. Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907)).

[84] U.S. CONST. amend. XXI, § 2.

[85] *See, e.g.*, Governor of Md. v. Exxon Corp., 279 Md. 410, 370 A.2d 1102, 1120-21, *aff'd*, 434 U.S. 814 (1977).

[86] Ellsworth v. Beechcraft, 37 Cal. 3d 540, 691 P.2d 630, 208 Cal. Rptr. 874 (1984), *cert. denied*, 471 U.S. 1110 (1985) (heirs of deceased passenger brought suit for wrongful death against estate of pilot and family owned flying business). "The purpose of the regulations is to protect those who fly in airplanes or are affected by their flight." *Id.* at 551, 691 P.2d at 636, 208 Cal. Rptr. at 88.

[87] Comment, *supra* note 6, at 1015. "It is generally recognized that the stimulus

states had some form of legislation imposing dram shop liability.[88] Currently thirty states have statutes establishing liability for the illegal sale of liquor.[89] At least fourteen of these statutes give an injured person a statutory right to recover directly from the server of alcohol.[90] Part of the rationale behind these statutes is to deter the sale of liquor to persons likely to injure themselves or a third party.[91] Policy reasons for imposing liability include the fact that commercial vendors can insure themselves against potential loss and are in the best position to control a patron's consumption of alcohol.[92]

A. *Common Law Liability And The Duty Of A Common Carrier*

Under early common law, an injured person had no cause of action against a commercial vendor of alcohol for the acts of an intoxicated patron.[93] The courts reasoned that the proximate cause of an injury caused by an intoxi-

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for early dram shop acts was the temperance movement rather than the more recent concern with drunk driving." *Id.* at n.13.

[88] Goldberg, *supra* note 6, at 86.

[89] *Id.* "Only in Arkansas, Delaware, the District of Columbia, Kansas, Louisiana, Maryland, Nebraska, Nevada and South Dakota are licensed alcoholic beverage dispensers exempt from liability." *Id.*

[90] ALA. CODE § 6-5-71 (1975); ALASKA STAT. § 4.21.02(1),(2) (1986); CONN. GEN. STAT. § 30-1-02 (1987); FLA. STAT. § 768.125 (1986); GA. CODE ANN. § 5A-109 (Supp. Harrison 1988); ILL. ANN. STAT. ch. 43, para. 135 (Smith-Hurd 1986); IND. CODE ANN. § 7.1-15-10-15 (Supp. Burns 1988); N.Y. GEN. OBLIG. LAW § 11-101 (McKinney 1978); N.C. GEN. STAT. § 18B-120 (1983); N.D. CENT. CODE § 5-01-06 (1986); OHIO REV. CODE ANN. § 4399.01 (Anderson 1982); R.I. GEN. LAWS § 3-14-1 to 3-14-15 (1987); UTAH CODE ANN. § 32A-14-1 (1986); VT. STAT. ANN. tit. 7, § 501 (Supp. 1987).

[91] Comment, *supra* note 6 , at 1015.

[92] *Id.*

> The justifications for imposing this burden of strict liability on commercial vendors are that they: (1) can purchase extensive liability insurance to bear the loss; (2) can spread the cost of insurance by increasing prices; (3) have expertise in judging whether a person is a minor or is intoxicated; and (4) can control the patron's consumption.

Id.

[93] *See, e.g.*, Nolan v. Morelli, 154 Conn. 432, 226 A.2d 383, 386 (1967) (at common law a party injured by a drunk patron has no cause of action against a vendor who continues to sell alcohol to the drunk patron).

cated person was the voluntary consumption of the liquor and not the vendor's act of serving the liquor.[94] In recent years, some courts have abrogated the harsh rule of nonliability under two theories: (1) common law negligence,[95] and (2) negligence as evidenced by a violation of alcohol beverage control statutes.[96] The basis for this recent trend of decisions is that the proximate cause of the injury changes from the consumption to the service of the liquor.[97]

The service of alcohol to someone becomes the proximate cause of an injury if serving the liquor is a "substantial factor" in causing the injury.[98] In other words, a seller or server of alcohol is liable if the service of alcohol creates a foreseeable and unreasonable risk of injury.[99] Under this theory, liability can be imposed for: (1) selling alcohol to a visibly intoxicated person;[100] (2) selling alcohol to a person known to become violent after drinking;[101]

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[94] *Id.* at 432, 226 A.2d at 386. "[T]he proximate cause of the intoxication was not the furnishing of the liquor, but the consumption of it by the purchaser or donee. The rule was based on the obvious fact that one could not become intoxicated by reason of liquor furnished him if he did not drink it." *Id.*

[95] Comment, *supra* note 6, at 1021. "Most jurisdictions following the Restatement position recognize that a duty exists when an act creates a foreseeable, unreasonable risk of harm to third parties." *Id.*

[96] Comment, *supra* note 6, at 1018. "[Liability is based] on the theory that alcoholic beverage control statutes create a duty on the part of alcohol vendors to third persons injured by intoxicated persons served in violation of the statute." *Id.*

[97] *See, e.g.*, Vesely v. Sager, 5 Cal. 3d 153, 486 P.2d 151, 95 Cal. Rptr. 623 (1971) (injured driver brought suit against a tavern owner for injuries sustained when an intoxicated patron's car struck the driver's car); Poole v. El Chico Corp., 713 S.W.2d 955 (Tex. Ct. App. 1986) (bar operator owes a duty to motoring public not to knowingly sell alcoholic beverage to an already intoxicated patron). "If such furnishing is a proximate cause, it is so because the consumption, resulting intoxication, and injury-producing conduct are foreseeable intervening causes, or at least the injury-producing conduct is one of the hazards which makes such furnishing negligent." *Vesely*, 5 Cal.3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

[98] *Id.* at 164, 486 P.2d at 158, 95 Cal. Rptr. at 631; *see* RESTATEMENT (SECOND) OF TORTS §§ 302, 302A (1965).

[99] *Vesely*, 5 Cal. 3d at 164, 486 P.2d at 159, 95 Cal. Rptr. at 631.

[100] *Id.* at 164, 486 P.2d at 159-60, 95 Cal. Rptr. at 631.

[101] Mason v. Roberts, 33 Ohio St. 2d 29, 294 N.E.2d 884 (1973) (plaintiff's cause of action was sufficient to raise the issue of liability based on sale of alcohol to an intoxicated person for harm to a third party).

and, (3) selling alcohol with knowledge that the intoxicated person will drive.[102] In many jurisdictions a server of alcohol can be liable for the injuries caused by an intoxicated person based on common law negligence. In the past three years, courts in Oklahoma, Texas, and West Virginia imposed liability on tavern owners for the first time.[103]

The elements of common law negligence are satisfied when a vendor serves alcohol to an already intoxicated person with knowledge that the person will drive.[104] A duty arises because a reasonable person should have known that serving liquor under those conditions would cause injury to a third party.[105] The nature of the relationship between a common carrier and a passenger imposes a high degree of care and duty towards the passenger.[106] Courts impose an even higher standard of care on common carriers towards passengers under a known disability.[107] Intoxication is considered a disability

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[102] Coulter v. Superior Court, 21 Cal. 3d 144, 577 P.2d 669, 145 Cal. Rptr. 534 (1978) (a social host who serves liquor under circumstances which create a reasonably foreseeable risk of harm to others can be held liable to injured third parties). "We think it evident that the service of alcoholic beverages to an obviously intoxicated person by one who knows that such intoxicated person intends to drive a motor vehicle creates a *reasonably foreseeable* risk to those on the highway. . . . Simply put, one who serves alcoholic beverages under such circumstances fails to exercise reasonable care." *Id.* at 152-53, 577 P.2d at 674, 145 Cal. Rptr. at 539.

[103] Goldberg, *supra* note 6, at 88.

[104] Comment, *supra* note 6, at 1021-22.

[105] *Id.* at 1022.

[106] *See, e.g.*, Rathvon v. Columbia Pacific Airlines, 30 Wash. App. 193, 633 P.2d 122, 125 (1981) (sixteen wrongful death actions were filed against an airline after the aircraft stalled and crashed approximately 2,000 feet from the end of the runway). A common carrier " [has] the duty to exercise the highest degree of care for the safety of its passengers consistent with the practical operation of its business. . . . This duty, however, falls short of making a common carrier an insurer of its passengers' safety." *Id.* at 193, 633 P.2d at 129.

[107] *See* American Airlines Inc. v. Marchant, 249 F.2d 612, 613-14 (1st Cir. 1957). Courts do not agree, however, on exactly what causes a breach of this higher standard of care owed to passengers with disabilities. In *Marchant*, a passenger recovered damages from the airline for a ruptured eardrum. The passenger was not aware of the ear disorder upon boarding, but notified a flight attendant as soon as he felt discomfort. The court of appeals for the First Circuit found that the ear discomfort qualified as a "disability". The attendant's knowledge of the disorder

which requires this higher standard of care on the part of the common carrier.[108]

There are few reported cases on the subject of a common carrier's liability resulting from the service of alcohol in transit. The common law basis for holding a common carrier (including trains and airlines) liable for the sale of alcohol is examined in the following cases. In *Cooper v. National Railroad Passenger Corp.*,[109] a passenger brought suit against the railroad for injuries sustained by falling while intoxicated on the train.[110] The plaintiff alleged that the train's employees continued to serve him liquor, knowing of his intoxicated state, which was the proximate cause of his injuries.[111] After acknowledging that the high standard of duty owed to a passenger makes the carrier liable for even the slightest negligence, the court nonetheless applied the early common law rule of nonliability toward vendors of alcohol.[112] The court held that the

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created a duty to use reasonable care to mitigate the damage to the eardrum. According to the court, the attendants were trained in procedures that could have prevented the ruptured eardrum. The court concluded that failure to aid the passenger caused a breach in the duty owed to him. *Id.*

In 1983, however, a district court in New York issued a decision inconsistent with *Marchant* in Sprayregen v. American Airlines, 570 F. Supp. 16, 17 (S.D.N.Y. 1983). In *Sprayregen*, the court held that there was no cause of action against the airline for a passenger's permanent hearing loss caused by a ruptured eardrum. The passenger, who boarded the plane with a head cold, claimed that the airline owed a duty to passengers to warn of the dangers of flying with a head cold. The court found that the airline did not have a duty to warn of dangers that affect only a few passengers, such as a head cold. In dictum, however, the court commented that the outcome of the decision may have been different if the airline's employees were aware of the particular disability. *Id.* at 17-18. It is difficult from these two cases to determine what level of duty is owed to a passenger experiencing a physical disorder. It is clear, however, that the airlines' notice of a physical disability is an important factor in establishing a higher level of duty.

[108] *See, e.g.*, Leval v. Dugoni, 444 So. 2d 778 (La. Ct. App. 1984) (a cab driver who knew of a passengers intoxication was held to an even higher standard of care in providing a safe place to exit than towards a sober passenger).

[109] 45 Cal. App. 3d 389, 119 Cal. Rptr. 541 (1975).

[110] *Id.* at 392, 119 Cal. Rptr. at 543.

[111] *Id.* at 393, 119 Cal. Rptr. at 544.

[112] *Id.* at 394, 119 Cal. Rptr. at 545. "[E]ach of the foregoing expressions of law reflects the basic view of society that self-police provides the primary defense against the evils of intoxication and outside police plays only a secondary role." *Id.* at 394, 119 Cal. Rptr. at 545.

proximate cause of the plaintiff's injuries was the voluntary consumption of the alcohol, not the service of the liquor. Consequently, the railroad was not liable for the plaintiff's injuries caused by serving him alcohol when he was already intoxicated.[113] The result of the holding is that the high standard of care owed to passengers did not include care and foresight in the service and sale of alcohol in the bar car.[114]

In *Hanback v. Seaboard Coastline Railroad*,[115] the court denied a cause of action to an injured passenger against a railroad for negligent sale of alcohol.[116] In *Hanback*, an intoxicated passenger assaulted and raped the plaintiff on board the train.[117] The plaintiff sued the railroad for damages based on the theory that the train's employee negligently continued to serve alcohol to the alleged rapist when the bartender should have known he was already intoxicated.[118] Although the plaintiff recovered damages based on a different theory of negligence, the court denied recovery to the plaintiff based on a theory of vendor liability.[119]

The *Hanback* court recognized that a common carrier owes a high duty of care to its passengers when the carrier can anticipate foreseeable danger.[120] The carrier, however, has only limited control over the actions of other passengers. Although it is impossible to watch over the

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[113] *Id.* at 393, 119 Cal. Rptr. at 544. "[E]ven though the server is negligent and in violation of law by continuing to serve alcoholic beverages to an obviously intoxicated drinker, the drinker's cause of action is barred by his own contributory negligence . . . by his voluntary assumption of the known and conspicuous risks incident to the consumptions of alcoholic beverages in bars." *Id.* at 393, 119 Cal. Rptr. at 544 (citation omitted).

[114] *Id.* at 393, 119 Cal. Rptr. at 544.

[115] 396 F. Supp. 80 (D.S.C. 1975).

[116] *Id.* at 90.

[117] *Id.* at 83.

[118] *Id.* at 81, 88.

[119] *Id.* at 88. Although the plaintiff did not recover for the negligence of the bartender, the court awarded damages for injuries resulting from the passenger service employee who heard the screams for help and did not come to the passenger's assistance. *Id.* at 90.

[120] *Id.* at 86-88.

behavior of all passengers, the court held that the train's employees had a duty to watch over those passengers that an employee should reasonably anticipate would behave improperly.[121] There was no indication from the facts in *Hanback*, however, that the accused rapist appeared drunk in front of the bartender. The drinks were purchased for a large group and taken back to the group. Consequently, the drinks were not consumed in front of the bartender.[122] The court held that the bartender could not have known who actually drank the liquor.[123] The railroad was not liable based on negligent sale of liquor to an intoxicated passenger because the bartender was unaware that the alleged rapist was drunk at the time of the sale. Although the court denied the plaintiff's right to recover under these facts, it is significant that the court left open the possibility for finding a common carrier liable for damages caused by the negligent sale of alcohol.[124]

In *O'Leary v. American Airlines*,[125] the plaintiff brought an action for personal injuries and wrongful death against the airline claiming that the plaintiff's decedent died as a result of injuries sustained in-flight. The plaintiff alleged that the defendant negligently allowed the decedent to board the plane while intoxicated and continued to serve him alcohol and food which proximately caused the decedent to choke to death on a piece of food.[126] The appellate court reversed the trial court's dismissal in favor of the airline.[127] The appellate court found that the plaintiff's pleadings were sufficient to make out the existence of

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[121] *Id.* at 87.

[122] *Id.* at 88.

[123] *Id.*

[124] *Id.* The court noted that there was insufficient proof to show that the assault and rape were proximately caused by the other passenger's intoxication. *Id.*

[125] 100 A.D.2d 959, 475 N.Y.S.2d 285 (App. Div. 1984).

[126] *Id.* at 959, 475 N.Y.S.2d at 287. The plaintiff attempted to bring a cause of action claiming that American Airlines violated 14 C.F.R. § 121.575, which provides in pertinent part: "No certificate holder may serve an alcoholic beverage to any person aboard any of its aircraft who . . . appears to be intoxicated." *Id.* at 959, 475 N.Y.S.2d at 287.

[127] *Id.* at 959, 475 N.Y.S.2d at 288. The appeals court agreed with the trial court that the FAA regulation was not intended to "protect an individual passenger

a duty on the part of the carrier and a breach thereof.[128] The airline owed a common law duty to the decedent to exercise reasonable care for known or reasonably anticipated risks because the decedent was under the disability of intoxication.[129]

A strong dissent argued that the defendant did not owe the decedent any special duty to protect him from the dangers of his own voluntary intoxication.[130] This analysis refers to the early common law rationale that the consumption, and not the service, of the liquor is the proximate cause of any injuries. The dissent argued that serving alcohol and food to an allegedly intoxicated passenger does not breach any duty owed to the passenger.[131]

The *O'Leary* case is authority, however, for the proposition that an airline may be held to owe a common law duty to an intoxicated passenger to refrain from the further service of alcohol. A breach of this duty could create a common law cause of action against the airline based on negligent service of alcohol. It is conceivable under this

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from choking to death as a result of his own intoxication." *Id.* at 959, 475 N.Y.S.2d at 288.

[128] *Id.* at 959, 475 N.Y.S.2d at 289. The "plaintiff sufficiently stated a cause of action for negligence, and she is entitled to an opportunity to present her proof at trial." *Id.*

[129] *Id.* at 959, 475 N.Y.S.2d at 288. "[A] common carrier . . . owe[s] a duty to . . . [a passenger] to exercise reasonable care for his safety. . . . Moreover, if a passenger suffers from a disability such as intoxication, there is a further duty on the part of the common carrier to exercise . . . additional care . . . ." *Id.* at 959, 475 N.Y.S.2d at 288. (citation omitted).

[130] *Id.* at 959, 475 N.Y.S.2d at 290.

> The mere act of serving food and beverages to a person could not reasonably be foreseen as causing that person to choke. . . . On the contrary, serving food to an inebriated person, assuming, *arguendo*, that the airline actually knew of decedent's state, is commonly perceived as a means of attempting to ameliorate that condition. It is questionable whether defendant could legitimately have refused to serve food or drink to decedent, a first-class passenger who requested this service.

Id. at 959, 475 N.Y.S.2d at 290.

[131] *Id.* at 959, 475 N.Y.2d at 290. The dissent recognized that allowing these sort of claims would "raise the spectre of indeterminate liability." *Id.* at 959, 475 N.Y.S.2d at 290.

analysis that the airline's duty to refrain from serving alcohol to intoxicated passengers extends to foreseeable victims on the ground.

B. *Liability Under State Dram Shop Legislation*

In several states, legislation supercedes judicial imposition of liability. Currently, at least fourteen states have modern versions of dram shop legislation which give a statutory cause of action against the server of alcohol.[132] Because of the difference in liability imposed by these dram shop statutes, there is a potential for inconsistent application of vendor liability on airlines. The court in *Manfredonia*[133] noted that the variety of liability imposed by state dram shop acts disturbs the uniform application of federal regulations.[134] Because of this potentially unsurmountable problem, the court created an implied private right of action from the FAA regulations. Assuming the court in *Manfredonia* incorrectly held that the FAA regulations pre-empt state dram shop law,[135] in order to determine liability under state law a court must decide under choice of law rules which state law applies.[136] This is not an easy task in light of the fact that it is difficult to determine where the in-flight service of alcohol occurred. It is possible for a plane to depart from one state, fly across five states (during which time a passenger becomes intoxicated), and land in yet another state. The intoxi-

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[132] *See supra* note 90; *see also* Comment, *The Continuing Search For Solutions To The Drinking Driver Tragedy And The Problem Of Social Host Liability*, 82 NW. U.L. REV. 403, 407 (1988).

[133] 68 A.D.2d 131, 416 N.Y.S.2d 286 (App. Div. 1979).

[134] *Id.* at 131, 416 N.Y.S.2d at 290.

[135] *See supra* notes 71-86 and accompanying text.

[136] *See* Smaha v. Hildebrand, No. 3-81-2038-6, slip op. (N.D. Tex. May 20, 1983) (LEXIS, Genfed library, Dist file). The court stated that:

> Before reaching this question of duty, however, it must first be determined whether Texas's [sic] or New Mexico's choice-of-law rules govern. In a diversity of citizenship action such as this, the federal court must apply the substantive law of the forum state, including the choice-of-law rules of the jurisdiction in which it sits.

Id.

cated passenger might drive out of that state and cause an accident in yet another state.

In addition, courts are split on the issue of whether the civil damage statute of the place of sale or the place of injury can be given extraterritorial effect.[137] For example, a person could be injured in New York by a drunk driver who bought and drank liquor in New Jersey, and later drove into New York. A threshold issue for the court would be whether New York's dram shop legislation applies to an injury which results from alcohol consumed in New Jersey. The determination rests on whether the New York legislature intended for the statute to have a broad reaching regulatory effect.[138]

In *Manfredonia*, the court noted that the dram shop legislation in some states has been given extraterritorial effect.[139] In all those cases, however, the sale of liquor occurred in the state which enacted the statute and the injury in another state.[140] In *Manfredonia*, both the consumption of the alcohol and the injury occurred outside the boundaries of New York.[141] The only contact with New York was that New York was the starting point of the flight. The court determined that the policy of the statute is not furthered by imposing liability for the sale of liquor outside the state's borders.[142] The court noted that to

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[137] *See* Osborn v. Borchetta, 20 Conn. Supp. 163, 129 A.2d 238 (Super. Ct. 1956) (Connecticut court applied the New York Dram Shop Act reasoning that, although the legislation lacked extraterritorial effect, it would be improper to deny the rights articulated in the act because they did not violate or offend the laws of Connecticut); *cf.* Waynick v. Chicago's Last Dep't Store, 269 F.2d 322 (7th Cir.), *cert. denied sub nom.* Saxner v. Waynick, 362 U.S. 903 (1959) (Michigan residents injured in a car accident in Michigan involving a car driven by an intoxicated driver who bought the liquor in Illinois were denied recovery under the Illinois dram shop act because the act lacked extraterritorial effect); *see supra* note 28.

[138] *Manfredonia*, 68 A.D.2d at 131, 416 N.Y.S.2d at 289.

[139] *Id.* 131, 416 N.Y.S.2d at 289.

[140] *Id.* at 131, 416 N.Y.S.2d at 289-90.

[141] *Id.* at 131, 416 N.Y.S.2d at 290. "As the beverages were served during the flight, both the sale of the liquor and the injuries occurred beyond the limits of New York." *Id.* at 131, 416 N.Y.S.2d at 290 (citation omitted).

[142] *Id.* at 131, 416 N.Y.S.2d at 290. "[T]he public policy reflected by our statute was to curb the evils and injuries arising from the sale of intoxicating beverages in the State. . . ." *Id.* at 131, 416 N.Y.S.2d at 290 (citation omitted).

hold differently would create uneven protection for passengers boarding flights from New York and those boarding flights in states not having the benefit of dram shop legislation.[143] The court concluded that such uneven protection would cause "chaotic and irreconcilable results."[144] In light of the varying liability imposed by different state legislatures, this is a valid argument. It is arguable, however, that the state in which a flight terminates has a great interest in whether or not passengers departing are intoxicated. This interest is potentially strong enough to override the policy of applying the law of the state where the alcohol was consumed.

III. CONCLUSION

In light of the growing trend of imposing liability on providers of alcohol, airlines should be held liable for injury that results from the service of alcohol. As common carriers, airlines owe the highest duty to passengers. The issue becomes whether an airline also owes a duty to the general public not to negligently serve alcohol. The growth in general vendor liability for injury to third parties is dramatic. It may not be long before such suits are common against airlines. Potential liability could be based on: (1) common law negligence; (2) state dram shop legislation; and (3) FAA regulations. Airlines may find themselves in the position of taking defensive measures, such as limiting the number of drinks allowed inflight, in order to protect themselves. Although such a profitable airline service creates incentive to continue selling alcohol, the airlines need to balance the potential for profit against the potential liability for injury to third par-

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[143] *Id.* at 131, 416 N.Y.S.2d at 290. The court stated in dictum that:

> [T]o enforce the statute for the benefit of any passenger embarking on a flight from New York to an out of state destination would cause chaotic and irreconcilable results springing from the uneven protection afforded to passengers boarding the flight from states not having the benefits of the dram shop act.

Id. at 131, 416 N.Y.S. at 290.

[144] *Id.* at 131, 416 N.Y.S. at 290.

ties, as well as the potential dangers of transporting intoxicated passengers.

The nature of air travel poses troublesome issues in resolving vendor liability for in-flight alcohol service. Each state regulates liquor within the boundaries of state lines. In addition, state legislation which imposes server liability varies widely. By relying on state law, a person's remedy is dependent on what law the court the case is filed in decides to apply. This potentially results in inconsistent application of liability caused by uneven statutory protection.

It is unclear whether federal aviation law pre-empts state law on the issue of vendor liability. To avoid the uneven application of liability under state laws, perhaps the FAA regulations need to be amended to reflect uniform imposition of liability for negligent in-flight service of alcohol. Until there is a move toward uniform legislation, airlines will increasingly be forced to settle suits out of court for injury caused by negligent in-flight service of alcohol. It would be prudent for airlines to take more aggressive measures to limit the service of in-flight alcohol.